SERVED: July 1, 1993

NTSB Order No. EA-3917

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of June, 1993

JOSEPH M. DEL BALZO, Acting Administrator, Federal Aviation Administration, Complainant, v. HUGH EDWARD EVANS, Respondent.	)	Docket SE-11033

OPINION AND ORDER

Respondent, appearing pro se, has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on April 25, 1991, following an evidentiary hearing.[1] The law judge affirmed that part of an order of the Administrator alleging that respondent had violated 14 C.F.R. 91.90(b)(1)(i)

[1]The initial decision, an excerpt from the hearing transcript, is attached.

and § 91.9.[2] The law judge dismissed the Administrator's charge that respondent had also violated § 91.24(c), in failing to have in use a Mode C transponder. As a result, the law judge reduced the sanction from a 90- to a 30-day suspension of respondent's commercial pilot certificate. We deny the appeal.[3]

Respondent admits that he was the pilot-in-command of a Cessna A150N Aerobat on the day in question and that he was operating the aircraft (which has aerobatic capability) in the area of Luling Bridge, southwest of New Orleans Moisant Airport. After departure from that airport, operating VFR,[4] and after being told to squawk 1200, respondent's Mode C transponder ceased

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[2]§ 91.90(b)(1)(i) (now 91.131), as pertinent, read:

> Flight in terminal control areas.
>
> (b) Group II terminal control areas -
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> * * *
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> (1) Operating rules. No person may operate an aircraft within a Group II terminal control area designated in Part 71 of this chapter except in compliance with the following rules:
>
> (i) No person may operate an aircraft within a Group II terminal control area unless he has received an appropriate authorization from ATC prior to the operation of that aircraft in that area. . . .

§ 91.9 (now 91.13(a)) provided:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[3]The Administrator did not appeal either the dismissal of the § 91.24(c) charge or the reduced sanction, and has not replied to respondent's appeal.

[4]Visual Flight Rules.

to function and Moisant air traffic control (ATC) could no longer determine his altitude. The record shows that ATC became concerned, as the area around Luling Bridge is on the border of the terminal control area (TCA), and was used for routing helicopter traffic. At that location, the TCA extended from 2,000 to 7,000 feet. Respondent had no clearance to enter the TCA. Of more immediate safety concern, ATC had just cleared another aircraft in a direction immediately towards respondent's aircraft. ATC advised that aircraft, a Turbo Lance, of respondent's aircraft and, after sighting respondent's Cessna, the Lance's pilot and copilot reported its various altitudes, all above 2,000 feet, and attempted to name maneuvers they testified that respondent performed.[5] Respondent, in turn, denied operating above 2,000 feet.[6] The law judge accepted the testimony of the pilot and copilot of the Lance.

On appeal, there is only one question before us: should we affirm the law judge's reliance on the testimony of the pilot and copilot of the Lance? If so, there is adequate evidence to find that respondent was at altitudes above 2,000 feet, and was therefore in the New Orleans Terminal Control Area without

[5]There is extensive discussion in the record, including by the law judge, of respondent's aerobatic maneuvers and the terminology for them. They are not in issue here. The § 91.9 carelessness finding was based on the TCA violation.

[6]Respondent introduced a letter from a passenger with him at the time. The letter also denied being in the TCA. The law judge indicated that he would not rely on this exhibit (R-2) because respondent did not offer the passenger as a witness and the Administrator had not had the opportunity to cross-examine him.

permission, in violation of § 91.90(b)(1)(i). We see no error in the law judge's decision.

Respondent continues to claim, as he did before the law judge, that the altitude estimates of the two eyewitnesses are unreliable, in great part because their aircraft was traveling in the opposite direction at a high speed and rate of climb, and because they arguably misidentified certain maneuvers respondent performed. Respondent also contends that their testimony of his altitude and maneuvering is not "substantially conclusive evidence."

The standard of proof the Administrator must bear is the preponderance of the evidence. That is, the majority of the evidence; this is not as strict a standard as "beyond a reasonable doubt." With respondent's Mode C transponder not working (for whatever reason), there is no way to judge his altitude except from eyewitness accounts. We cannot find it was error for the law judge to accept the testimony of two disinterested pilots, rather than self-serving testimony of respondent. See Administrator v. Klock, NTSB Order EA-3045 (1989) at 4 (law judge's credibility choices "are not vulnerable to reversal on appeal simply because respondent believes that more probable explanations...were put forth...."); and Administrator v. Jones, 3 NTSB 3649, 3651 (1981). Accord NTSB Order EA-3670, Administrator v. Herson (1992) and NTSB Order EA-3669, Administrator v. Prosser (1992). And, we reject the notion, urged by respondent, that the distances at issue here

could not be reasonably estimated by pilots in a nearby aircraft.

In discussing their testimony, the law judge stated:

> [T]hey're looking, just like any good pilot's going to be doing. And there's two of them up there looking. . . . Well, you've got two fairly well trained pilots coming along on an instrument flight plan but they're looking in VFR conditions and they're looking for you.
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> And they see you and you're real close and both of them see you. Both have an estimate of distance. I understand that that estimate of distance can vary, but it's not going to vary as much as it would have to vary for you to be below two thousand feet.
>
> They - - their altitude has been verified. They set their altimeter. The departure control people are verifying. They're talking back and forth. So, . . . I'm satisfied that you were inside that control zone at that time.

Tr. at 293-294. We can see no error in this analysis, even had the eyewitnesses misidentified or partially misdescribed the maneuvers they believed respondent to have been performing (due to the relatively short time they observed respondent and the angles at which their observation occurred, see Tr. at 295). To a great extent, the law judge's analysis is based on credibility determinations, and we cannot find them to be arbitrary or capricious or otherwise reversible as incredible. Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there (resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The 30-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.[7]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[7]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).